2000

Meadow Valley Contractors, Inc. v. Transcontinental Insurance Company : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

MEADOW VALLEY CONTRACTORS, INC., a Nevada Corporation,	)	No. 20000262~~-SC~~ CA
Appellee,	)	Priority No. 15
TRANSCONTINENTAL INSURANCE COMPANY,	)	
Appellant.	)	

REPLY BRIEF

APPEAL FROM THIRD DISTRICT COURT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE J. DENNIS FREDERICK

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POINT I

THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT.

Meadow Valley Contractors, Inc.'s (hereinafter "Meadow Valley") brief fails to dispute any of the statement of facts as contained in Transcontinental Insurance Company's (hereinafter "Transcontinental") brief. Furthermore, Meadow Valley fails to dispute that there are disputed issues of fact regarding the negligence of Meadow Valley or the proximate cause of the flooding.

Rather, Meadow Valley seeks to impose an unduly broad interpretation on the term "arising out of" and argues that because BT Gallegos Construction Company (hereinafter "BT Gallegos") was working in the area, the flooding "arose out of" BT Gallegos' work. Clearly, Meadow Valley's argument is without merit.

Because Meadow Valley has failed to dispute the statement of facts contained in Transcontinental's brief and because Meadow Valley has failed to dispute that there are disputed issues of fact, this Court may assume that the issues of material fact which preclude summary judgment contained on pages 8 and 9 of the brief of Transcontinental are indeed disputed issues of fact. Therefore, because this Court, like the trial court, must view "the facts and incidents in the light most favorable to the non-moving party", this Court should reverse the trial court's grant of summary judgment and remand the case for

further proceedings to resolve the factual disputes. See Nelson v. Salt Lake City, 919 P.2d 568, 571 (Utah 1996).

POINT II

SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE THE FACTS OF THE CASE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO TRANSCONTINENTAL, SHOW THAT THE FLOODING DID NOT "ARISE OUT OF" BT GALLEGOS' WORK.

Meadow Valley argues that this Court should interpret the insuring clause "arising out of your work" very broadly. In support of its argument, Meadow Valley claims that the Texas cases cited by Transcontinental, Granite Construction v. Bituminous Insurance Company, 832 SW.2d 472 (Texas App. 7th Div. 1992) and Northern Insurance Company of New York v. Austin Commercial, Inc., 908 F Supp. 436 (ND Texas 1994), have been "distinguished and/or overruled". (See Brief of Appellee at page 15.) However, Meadow Valley's argument is without merit and belies a misunderstanding of Texas law and the posture in which these cases arose.

In support of its position that Granite Construction Company and Austin Commercial have been overruled, Meadow Valley cites Admiral Insurance Company v. Trident NGL, 988 SW 2d 451 (Texas App. 1st Div. 1999) and McCarthy Brothers Company v. Continental Lloyds, Inc., 7 SW 3d 725 (Texas App. 3rd Div. 1999). The Court will note that the Granite Construction Company case comes from the Seventh District of Texas while the Admiral Insurance Company and McCarthy Brothers cases

come from the First and Third Districts respectively. Under Texas law, the various divisions of the Court of Appeals have independent jurisdiction and "the opinions of a sister Court of Appeals are not precedent that bind other courts of appeals." Mitchell v. Wiesner, Inc., 923 SW 2d 262, 264 (Texas App. 9th Dis. 1995). Citing Eubanks v. Mullin, 909 SW 2d 574 (Texas App. 1995); see also Shook v. State, 244 SW 2d 220 (Tex. Crim. 1951)(holding that opinions of sister appellant court do not set precedent that bind other courts of appeals).

Therefore, to argue that the Granite Construction Company case has been "overruled" is without merit. At most, other Texas Courts of Appeals have disagreed with the Seventh District's decision in Granite Construction Company.

In any event, this Court should decide the proper interpretation of the insurance policy here based upon the merits of the issue, not by taking a vote and determining what the majority position may be.

The Granite Construction Company and Austin Commercial decisions are clearly the better reasoned decisions and their reasoning should be adopted by this Court. The insurance provision at issue here grants only limited coverage to Meadow Valley. Its plain and unambiguous terms give benefits to Meadow Valley as an additional insured "with respect to liability arising out of" "[BT Gallegos'] work". The policy defines "[BT Gallegos'] work" as "work or operations performed by [BT Gallegos] or on [BT

Gallegos'] behalf" and "materials, parts, or equipment furnishing connection with such work or operations".

As established by the undisputed statement of facts contained in the opening brief of Transcontinental, the flooding in this case was caused by the failure of a ditch which was neither constructed nor maintained by BT Gallegos. This ditch which was constructed by another subcontractor Therefore, was not "[BT Gallegos'] work" within the meaning of the insurance policy. Construing the Transcontinental insurance policy according to its plain and unambiguous meaning, this Court should hold, as did the Austin Commercial and Granite Construction courts, that Transcontinental owes no duties to Meadow Valley to defend or indemnify Meadow Valley. See Nielsen v O'Rielly, 848 P.2d 664 665 (Utah 1992)(holding that "the terms of insurance contracts... are to be interpreted according to their usually accepted meanings and should be read as a whole, in an attempt to harmonize and give affect to all of the contact provisions").

Furthermore, should this Court adopt the reasoning of the Granite Construction and Austin Commercial cases, this Court would be upholding the purposes for which the parties entered into this insuring agreement in the first place. As the dissent in Admiral Insurance Company v. Trident NGL, Inc., 988 SW 2d 451, 457 (Texas App. 1st Dis. 1999)(dissent) points out,

> As can be seen from this case and the other Texas case on point, the purpose of obtaining the coverage here is to protect the additional insured from acts of the named insured who has entered into a contract to provide a

> service to the additional insured.... The main company (Trident) wants protection from suits brought by persons injured by agents of the servicing company (KD Oilfield Service) who are on the premises to provide service to the main company. The main company requires the servicing company to obtain the coverage as a commission of receiving the servicing contract....
>
> It is clear to me that the liability in this case arose from the operations of the main company. *See and compare* State Farm Fire and Casualty Company v. Vaughan, 968 SW 2d 931, 932-34 (Texas 1998)(Supreme Court focused on the actual activity creating liability and determining application of exclusion for injuries "arising out of or in connection with" and insured's business). Here, the operations of the servicing company that placed its agent in harms way were not a cause of the harm. The servicing company had no liability for the contest or exposure in this case.
>
> To extend coverage to the acts of the main company that harm the agent of the servicing company upsets the delicate balance between the cost of this insurance policy and the coverage it provides. The result the majority gives the main company, the tortfeasor in this case, an alternative source of coverage for its own negligence, at the expense of the named insured, the servicing company. To uphold this result as an application of the rule requiring ambiguous policy provisions to be construed in favor of the insured is particularly inappropriate here because the servicing company paid for the policy.

The plain and unambiguous terms of this contract indicates no intention of the parties that the insurance policy was purchased to protect Meadow Valley from Meadow Valley's own negligence. In fact, as pointed out by the Appellee in their brief at page 20, the subcontract agreement between BT Gallegos and Meadow Valley states that "the subcontractor's obligation under this provision should not extend any liability caused by the sole negligence of the indemnitee. " (R. 72.)

Therefore, if any intention of the parties can be divined from the record before this Court, it is that the parties intended for the insuring agreement between Transcontinental and BT Gallegos would cover Meadow Valley only for accidents which arose out of BT Gallegos' negligence. There is no indication that the insuring agreement was ever intended to cover Meadow Valley for Meadow Valley's own negligence.

POINT III

INTERPRETING THE ADDITIONAL INSURED ENDORSEMENT AS AFFORDING COVERAGE FOR MEADOW VALLEY'S OWN NEGLIGENCE WOULD BE CONTRARY TO UTAH LAW.

Meadow Valley argues that Utah Code Ann. § 13-8-1(2) is inapplicable to this case because it applies only to construction contracts. Meadow Valley misapprehends Transcontinental's arguments on this point.

A copy of Utah Code Ann. § 13-8-1 is attached hereto as an addendum to this brief. Under Utah Code Ann. § 13-8-1(2), "an indemnification provision in a construction contract is against public policy and is void and unenforceable." An indemnification provision is defined in Utah Code Ann. § 13-8-1(1)(b) as "a covenant, promise or agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to **insure**, hold harmless, indemnify, or defend the promisee or others against liability." (Emphasis added.) Therefore, under § 13-8-1(2) an insurance subcontract, like the contract between BT Gallegos and Meadow Valley cannot contain an indemnification provision. Furthermore, an indemnification

provision is a provision which agrees to insure the other party for that party's negligence. Therefore, under § 13-8-1(2) BT Gallegos was statutorily prohibited from purchasing any sort of insurance policy which would insure Meadow Valley for Meadow Valley's own negligence.

In the face of this clear statutory prohibition, Meadow Valley argues that the subcontract agreement between BT Gallegos and Meadow Valley required BT Gallegos to purchase an insurance policy which would insure Meadow Valley for Meadow Valley's negligence. Therefore, Meadow Valley argues, the insurance policy actually purchased by BT Gallegos in fact insures Meadow Valley for Meadow Valley's own negligence.

However, since Utah Code Ann. § 13-8-1 prohibited the purchase of an insurance policy by BT Gallegos insuring Meadow Valley for Meadow Valley's own negligence, this Court should not interpret the insurance policy actually purchased by BT Gallegos as covering Meadow Valley for Meadow Valley's own negligence since such an interpretation would conflict with statutory prohibition of Utah Code Ann. § 13-8-1(2).

Utah Code Ann. § 13-8-1 is a statement of both public policy and a guide to interpretation of agreements relating to a construction contract like the insurance policy issued by Transcontinental. In accordance with § 13-8-1, BT Gallegos purchased an insurance policy from Transcontinental which indemnified Meadow Valley for claims arising from work performed by BT Gallegos. Meadow Valley could not have required

BT Gallegos to provide an insurance policy for claims arising from Meadow Valley's own negligence without violating Utah law.

Therefore, this Court should read the insurance policy issued by Transcontinental as being consistent with Utah law, i.e. indemnifying BT Gallegos for BT Gallegos' negligence and any damages which arose out of that negligence. However, because under § 13-8-1 BT Gallegos could not purchase an insurance policy which indemnified Meadow Valley from Meadow Valley's own negligence, this Court should read the insurance policy as being consistent with Utah Code Ann. § 13-8-1. Since the flood damage was caused by the actions of a Meadow Valley employee, Transcontinental does not have a duty to indemnify Meadow Valley for this loss.

The case cited by Meadow Valley in support of its argument is inapplicable. In Shell Oil Company v National Union Fire Insurance Company of PA, 52 Cal. Rptr. 2d 580 (Cal. App. 2d 1996), there is no indication that the statutory prohibition against indemnification agreements in construction contracts contained the same language as Utah Code Ann. § 13-8-1. The key language in the Utah Code provision is found in § 13-8-1(1)(b). That subsection defines a prohibited "indemnification provision" to include provisions agreeing to "insure" another party to the contract for the other party's negligence.

Therefore, because the California statutory prohibition against indemnification provisions did not include the language of § 13-8-1(1)(b), the Shell Oil decision cited by Meadow Valley is in applicable.

CONCLUSION

For the reasons and arguments stated above, and in Transcontinental Insurance Company's opening brief, Transcontinental Insurance Company respectfully requests this Court to reverse the trial court's grant of summary judgment and remand this case for trial.

Respectfully submitted this 10 day of January, 2001.

PLANT, WALLACE, CHRISTENSEN & KANELL

SCOTT W. CHRISTENSEN
JASON M. KERR

MAILING CERTIFICATE

I hereby certify that on the 10 day of January, 2001, a true and correct copy of the above mentioned pleading was mailed, postage prepaid, to the following:

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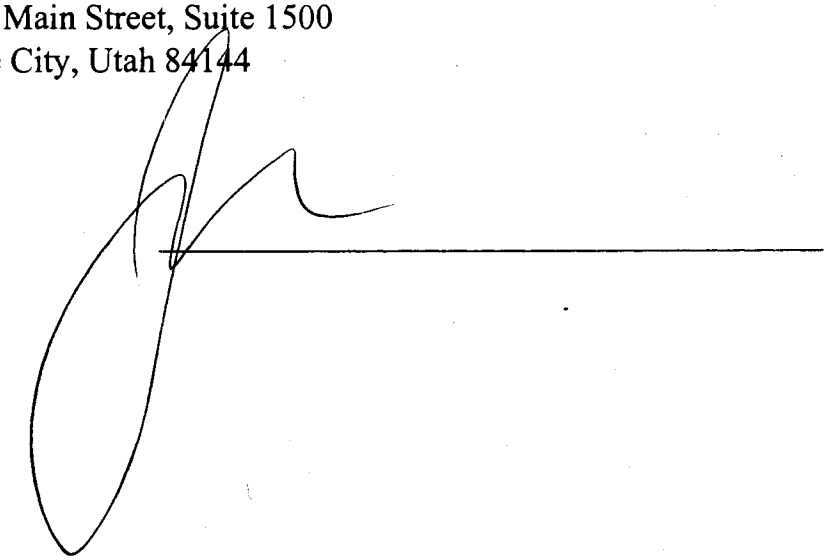

ADDENDUM

13-8-1. Construction industry — Agreements to indemnify.

(1) For purposes of this section:

(a) "Construction contract" means a contract or agreement relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvement to real property, including moving, demolition, or excavating, connected to the construction contract between:

(i) a construction manager;

(ii) a general contractor;

(iii) a subcontractor;

(iv) a sub-subcontractor;

(v) a supplier; or

(vi) any combination of persons listed in Subsections (1)(a)(i) through (v).

(b) "Indemnification provision" means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:

(i) the damages arise out of:

(A) bodily injury to a person;

(B) damage to property; or

(C) economic loss; and

(ii) the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees.

(2) Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.

(3) When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(i), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a), if:

(a) the damages are caused in part by the owner; and

(b) the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).

(4) This section may not be construed to affect or impair the obligations of contracts or agreements, that are in existence at the time this section or any amendment to this section becomes effective.

History: L. 1969, ch. 35, § 1; 1997, ch. 113, § 1.

Amendment Notes. — The 1997 amendment, effective May 5, 1997, rewrote the first paragraph of the section as Subsections (1) to (3) and designated the former second undesignated paragraph as Subsection (4), substituting "this section or any amendment to this section" for "the act" and making stylistic changes.